

capacity as an individual; **Daniel Kunnecke** ("Kunnecke"), Director and Executive Officer of NY LMR, in his capacity as an individual; **Robert Depolito** ("Depolito"), Director of NY LMR, in his capacity as an individual, and **Steve Simon** ("Simon"), Director of NY LMR, in his capacity as an individual, have, as a condition of settlement and in lieu of signing the Settlement Agreement, executed individual consent agreements, copies of which are attached hereto as Attachment 1 and incorporated herein by reference, stating that each will not hold a license for an FB7 station authorized to operate on frequencies above 800MHz and will not apply for, or be a party to, an application before the Commission for such a license (Mangan, Larkin, Blass, Campbell, Villanela, Kunnecke, Depolito and Simon, each a "Director" and collectively, the "Directors").

Background

3. Norcom, located in Bayshore, New York, currently holds five (5) Commission authorizations for Specialized Mobile Radio ("SMR") stations WZA770, WNBW505, WNAJ380, WNRU218 and WNJU965, and one (1) Business Radio authorization for WNQF836, a station used for private, internal communications. These authorizations, among others, enable Norcom to operate as a communications company providing SMR and other communications services to customers on a "for-profit" basis. Norcom also manages communications systems that are licensed to others. As used in this Settlement Agreement, "for-profit" means [a service] established for the purpose of receiving compensation or monetary gain from users.

4. In 1990 and 1991 Norcom assisted with the formation and organization of seven non-profit associations (collectively, the "associations"). Two of those Associations did not obtain Commission authorizations. Three of those associations (the

"Associations") remain parties in WTB Docket No. 98-181 and are parties to this Settlement Agreement. The remaining two of those associations, Wireless Communication of Suffolk ("Suffolk") and Metro NY LMR ("Metro"), surrendered their Commission authorizations for cancellation and withdrew their appearances in WTB Docket No. 98-181. On March 17, 1999 the Presiding Judge certified the Suffolk and Metro cases for administrative disposition. Suffolk and Metro are not parties to this Settlement Agreement.

5. After their formation, five of the associations, with the assistance of Norcom, obtained a Commission authorization to operate a FB7 station on frequencies above 800 MHz. As used in this Settlement Agreement, "FB7" means a Private Mobile Radio Service station that is authorized to operate on a not-for-profit, cost-shared basis pursuant to 47 C.F.R. §90.179(f). The operations of the associations were conducted from the same business address as Norcom and Norcom managed the associations and the non-profit stations licensed to the associations (WPAT-918, licensed to East End; WPAP-734, licensed to the NY LMR; WNXT-323, licensed to LMR 900; WPAT-910, formerly licensed to Suffolk and WPAZ-643, formerly licensed to Metro).

6. In 1996, the Commission initiated an investigation of Norcom's and the Associations' compliance with the Commission's rules. As a result of that investigation, on October 14, 1998, the Commission released an *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* ("HDO"). The HDO specified the following issues: (a) to determine whether Norcom, East End, LMR 900, Metro, NY and/or Suffolk violated Section 310(d) of the Act by engaging in unauthorized transfers of control of Stations WPAT918, WNXT323, WPAZ643,

WPAP734, and/or WPAT910; (b) to determine whether Norcom, East End, LMR 900, Metro, NY and/or Suffolk violated Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f), by operating Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910 on a for-profit basis; (c) to determine whether Norcom has abused the Commission's processes in connection with the creation and/or control of the Associations and/or with the control and/or operation of the Associations' stations; (d) to determine, in light of the evidence adduced pursuant to the foregoing issues, whether Norcom, East End, LMR 900, Metro, NY and/or Suffolk are basically qualified to be Commission licensees; (e) to determine, in light of the evidence adduced pursuant to issues (a)-(d), whether the above-captioned licenses should be revoked; and (f) to determine, in light of the evidence adduced pursuant to issues (a)-(d), whether the above-captioned applications should be granted. The HDO also specified a maximum forfeiture liability of \$185,000 for Norcom and \$37,000 for each association.

7. Norcom and the Associations filed appearances. Norcom, East End, LMR 900 and NY LMR remain parties in WTB Docket No. 98-181, which is pending before the presiding Administrative Law Judge.

8. The Parties acknowledge that users of the facilities licensed to the Associations, Suffolk and Metro have, since the time the HDO was issued, submitted applications for use of the frequency assignments associated with the associations' systems. The Parties desire to prevent disruption of these users' ability to meet their communications needs and enter into this Settlement Agreement, in part, in order to effectuate that result.

Agreement Terms

Procedures

9. Within ten (10) business days after the Effective Date, Norcom and the Associations shall file with the Judge a motion seeking Summary Decision of the designated issues in this proceeding consistent with this Settlement Agreement¹ and ordering such other actions as may be necessary or useful to effectuate the objectives of this Settlement Agreement (the "Order"), and simultaneously the Parties shall file a request for approval and adoption of this Settlement Agreement. It is contemplated that action on both requests will result in termination of the hearing proceeding. All Parties shall use their best efforts to secure the issuance and finality of an Order by the Presiding Judge granting the requested relief and terminating this proceeding.

¹ The joint motion shall request:

- (1) A decision adverse to Norcom, East End, LMR 900 and NY LMR upon issue (a) of the HDO [unauthorized transfer of control];
- (2) A decision adverse to Norcom, East End, LMR 900 and NY LMR upon issue (b) of the HDO [operating nonprofit stations on a for-profit basis];
- (3) A decision in Norcom's favor upon issue (c) of the HDO [abuse of process];
- (4) A decision in Norcom's favor upon issue (d) of the HDO [qualification];
- (5) A decision in Norcom's favor upon issue (e) of the HDO [revocation];
- (6) For violation of Section 310(d) of the Act, 47 U.S.C. § 310(d), and Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f), imposition of a forfeiture of \$110,000 by Norcom to be paid in five installments, the first installment (\$22,000) to be due within ten (10) business days after the time for seeking reconsideration, administrative review or judicial appeal of the Order of the Presiding Judge has expired or, if there has been a timely appeal, the Order of the Presiding Judge has been upheld and the time for seeking further reconsideration, administrative review or judicial appeal has expired, pursuant to 47 C.F.R. §§ 1.113, 1.117, 1.106 (the "Finality" Date), the subsequent four installments (\$22,000 each) to be due exactly three, six, nine, and 12 months after the first installment is due.
- (7) As a sanction for violation of Section 310(d) of the Act, 47 U.S.C. § 310(d), and Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f), imposition of a forfeiture of \$3,000 each against East End, LMR 900 and NY LMR to be due in full within ten (10) business days of the Finality Date.

Voluntary Agreement

10. The Private Parties acknowledge that they have been represented by communications counsel in connection with the preparation and execution of this Settlement Agreement. The Private Parties acknowledge that they fully understand each and every provision contained in this Settlement Agreement, and that they have entered into and executed this Settlement Agreement voluntarily.

Jurisdiction

11. The FCC Litigants acknowledge the jurisdiction of the Commission over them and the subject matter of this proceeding for purposes of this Settlement Agreement and the Order adopting this Settlement Agreement.

12. The Individuals, Robert and Douglas Nopper, hereby voluntarily submit themselves, for the purposes of this Settlement Agreement, to the jurisdiction of the Commission and the Presiding Judge in WTB Docket No. 98-181 (this "Proceeding") and agree to accept and abide by the terms of the Order issued pursuant to this Settlement Agreement.

Appeal Waiver

13. The Private Parties hereby agree not to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge the Order of the Presiding Judge unless the resolution of the issues presented in the HDO or the sanctions imposed by the Order differ materially from those specified in footnote 1 of this Settlement Agreement. The foregoing notwithstanding, if a third party seeks administrative or judicial reconsideration, review, appeal, or stay, or otherwise challenges the Order of the Presiding Judge, the Parties may participate in any administrative or

judicial proceedings so initiated by such request for review, appeal or challenge in order to urge the continued validity of provisions of the Order that are consistent with the decisions contemplated by footnote 1 of this Settlement Agreement.

Admissions

14. This Settlement Agreement is for settlement purposes only. Nothing in this Settlement Agreement or in the Order approving and/or adopting this Settlement Agreement shall constitute or be deemed to constitute an admission by the Parties with respect to any issue of fact or law or to any violation of the Commission's Rules or of the Communications Act of 1934, as amended (the "Act"), except in connection with this Settlement Agreement or in connection with any Order issued pursuant to this Settlement Agreement.

Summary Decision Required

15. Except as otherwise specified herein, the provisions of this Settlement Agreement shall become effective on the Effective Date. If the Presiding Judge fails to issue an Order as described and contemplated herein, this Agreement shall become null and void. In the event any material provision of this Order is reversed or invalidated, any admissions or agreements will be deemed withdrawn and shall not be used by any Party against another Party.

Evidence

16. The Private Parties agree that there is sufficient evidence from which a reasonable trier-of-fact could find that:

- a. As alleged in the HDO, Norcom and the Associations transferred control, as defined in Paragraphs eight (8) and nine (9) of the

HDO, from the Associations' stations to Norcom without prior authorization from the Commission, in violation of Section 310(d) of the Act, 47 U.S.C. § 310(d); and

- b. Norcom and the Associations used the Associations' stations to provide communications on a for-profit basis, as alleged in the HDO, in violation of Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f).

17. The Bureau agrees that there is evidence from which a reasonable trier-of-fact could find that:

- a. Norcom did not abuse the Commission's processes; and
- b. Norcom is qualified to be a Commission licensee.

Norcom Terms

18. Norcom agrees to the following terms:

- a. Norcom shall pay a forfeiture of \$110,000 in five installments: the first installment of Twenty-two Thousand Dollars (\$22,000) is due within ten (10) business days after the Finality Date and the subsequent four installments, of Twenty-two Thousand Dollars (\$22,000) each, are due exactly three, six, nine, and 12 months after the first installment is due.
- b. Any payment required by this Agreement, and ordered by the Order, which is not received by the Commission, at its designated location², on or before it is due is in "default." Norcom hereby

agrees that if it defaults in delivery of such a payment, the Bureau may, at its option, cancel all of Norcom's SMR licenses. Norcom further agrees that it will not, in any circumstance, attempt to countermand or withdraw its agreement to this term unless such countermand or withdrawal is based upon the Bureau's failure to abide by the terms of this Settlement Agreement.

- c. After the Effective Date, Norcom shall not manage any FB7 station authorized to operate on frequencies above 800 MHz, except that Norcom shall be permitted to manage the Associations' stations subject to this Agreement until the licenses for those stations are cancelled pursuant to this Agreement.

² Unless otherwise instructed by the Commission, any payment required by this Agreement, or ordered by the Order, shall be wired or paid by check or similar instrument payable to the order of the Federal Communications Commission and may be hand-delivered to the Commission at 445 12th Street, Room 1-A820; mailed to Post Office Box 73482, Chicago, Illinois 60673-7482 or wired pursuant to the following instructions: At least one hour before the wire transfer but on the same business day, fax a completed FCC Form 159 (FCC Remittance Advice) and FCC Form 159-C (Advice Continuation Sheet), if any, to Mellon Bank in Pittsburgh, PA at (412) 236-5702. At the top of the FCC Form 159 indicate "Wire Transfer – Forfeiture Payment" and the date of the wire. Enter the P.O. Box 358325 at the top of the Form 159 and Payment Type Code "FORT" in Block 1. Give the following information to your bank in order to complete the wire transfer: ABA Routing Number 043000261, Receiving Bank: Mellon Pittsburgh, BNF: FCC/AC – 9116106, OBI Field: (Skip one space between each information item), "FORFEITUREPAY", PAYER TIN, PAYMENT TYPE CODE (Exactly as on Form 159, Block 20), FCC CODE 1 (Only complete this block if required), FCC Code 2 (Only complete this block if required), PAYOR NAME (Exactly as on Form 159, Block 2), Daytime Phone No. (Exactly as on Form 159, Block #17). All supporting applications/filings must be filed directly with the Financial Operations, 445 12th Street, S.W., Washington, D.C. 20554, Attn: Credit & Debt Management Center. A copy of the FCC Form 159 must be attached to the application / filing package. A wire transfer is not considered complete until both the FCC Form 159 has been faxed to Mellon Bank and the wire transfer has been made. The effective receipt date for all wire transfers is the latter date on which both items were received by Mellon Bank. No wire transfers will be allowed after 6:00 p.m. EST. Your bank may have similar cutoff time frames. Your FCC Form 159 and your wire transfer must arrive at Mellon Bank on the same day in order for you to receive proper credit for your payment.

- d. After the Effective Date, Norcom shall not hold a license for any FB7 station authorized to operate on frequencies above 800 MHz and shall not apply for or be party to any application before the Commission for such a license;
- e. On or before the Finality Date, Norcom shall institute a Compliance Program that shall remain in effect for a period of three years after the Finality Date. This Compliance Program will include measures to insure the compliance of the officers, directors, employees and others who act on behalf of Norcom (collectively, "personnel"), with the Commission's Rules, policies and regulations regarding unauthorized transfer of control and the proper operation of community repeater systems compliant with the FCC's regulations. The compliance procedures adopted under this Compliance Program will specifically educate Norcom personnel with the requirements of Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), including standards announced in Intermountain Microwave, 24 RR 963 (1963) and will monitor the performance of Norcom's personnel to insure conformity with the Communications Act of 1934, as amended, and the Commission's Rules, regulations and policies.
- f. For a period of three years after the Finality Date Norcom shall submit quarterly reports to the Bureau regarding its management

agreements, if any, and its compliance with the Commission's Rules. Specifically, within five (5) business days after the Finality Date, Norcom shall deliver to the WTB copies of all of Norcom's agreements to manage stations licensed to other entities. These agreements will be withheld from public inspection by the WTB as contemplated in 47 C.F.R. §§ 0.457 and 0.459, or any successor provisions, provided that the Commission may be required, pursuant to a request made under the Freedom of Information Act ("FOIA" request), as provided in 47 C.R.F. §0.461 et. seq, to make such agreements publicly available. The remaining quarterly reports shall be filed with the Commission on the fifth (5th) day of each subsequent quarter. Each quarterly report shall be signed by an Officer or Director of Norcom and shall state whether Norcom has entered into any new management agreements since the previous report and shall include copies of all new management agreements, which shall also be withheld from public inspection by the WTB as described above, provided however, that such agreements may also be made publicly available pursuant to a FOIA request.

- g. Attached hereto as Attachment 2 and incorporated herein by reference, is an affidavit from Robert Nopper which includes his statement that Norcom relied upon the advice of then-counsel George Petrutsas in assisting in the formation and organization of

the associations and in managing their stations; and that Mr. Petrutsas drafted much of the language used in the management agreements between Norcom and the associations..

- h. Norcom agrees that, until it fully pays the monetary forfeiture amount prescribed in the Order, Norcom will not voluntarily file with any U.S. Bankruptcy Court any debtor's petition or request for relief.
- i. Norcom agrees that it will not submit any FOIA requests seeking documents relating to this proceeding unless those documents are needed in order to enforce and defend this Settlement Agreement.
- j. Norcom agrees that the Motion For Summary Decision will request dismissal, without prejudice, of the applications which were designated in the HDO.

Associations' Terms

- 19. Each Association agrees to the following terms:
 - a. Within ten (10) days after the Effective Date, East End, LMR 900 and NY LMR each shall surrender all of its FB7 licenses to the Commission for cancellation, such cancellation to be effective no earlier than forty-five (45) days after the Finality Date.
 - b. Within ten (10) business days after the Finality Date, East End, LMR 900 and NY LMR each shall pay a monetary forfeiture of \$3,000 in full. Unless otherwise instructed by the Commission, payments may be made as described in footnote 2 of this Agreement.

- c. Except for the authorizations specified in the HDO, the cancellation of which is provided by subparagraph (a) above, after the Effective Date, East End, LMR 900 and NY LMR each shall not hold a license for an FB7 station authorized to operate on frequencies above 800 MHz and shall not apply for or be party to an application before the Commission for such a license;
- d. Attached hereto as Attachment 3 and incorporated herein by reference, is a declaration from George Petrutsas, counsel for the Associations, which includes his statement that he advised Norcom and the associations regarding the formation, organization and management of the associations; his statement that Norcom and the associations materially followed his recommendations in forming and organizing the associations; and his statement that he drafted much of the language used in the management agreements between Norcom and the associations. Such declaration is to be used solely for the purposes of resolving this case and for no other purpose.
- e. Attached hereto as Attachment 1 and incorporated herein, are statements from Timothy J. Mangan, William Larkin, Laurence T. Blass, James Campbell, John Villanela, Daniel Kunnecke, Robert Depolito, Steve Simon, each of whom are directors of the Associations, stating that, as individuals, they will not hold any FB7 station authorized to operate on frequencies above 800 MHz and that

they shall not apply for or be a party to any application before the Commission for such a license.

Individuals' Terms

20. In consideration of the representations contained in this Settlement Agreement, Robert Nopper, individually and Douglas Nopper, individually, each agrees:

- a. To submit to the jurisdiction of the Commission and the Presiding Judge in this proceeding and to obey any Order issued herein;
- b. Not to hold any license for an FB7 station authorized to operate on frequencies above 800 MHz;
- c. Not to apply for, or be a party to, any application before the Commission for a license for an FB7 station authorized to operate on frequencies above 800 MHz;
- d. Not to manage an FB7 station authorized to operate on frequencies above 800 MHz, except that they may continue to manage the licenses of the Associations until those licenses are cancelled pursuant to this Agreement.
- e. Not to individually cause the filing of, or urge other persons to file, creditors' petitions forcing Norcom into involuntary bankruptcy, until such time as the monetary forfeiture specified in the Order is fully paid.

Bureau Terms

21. The Bureau agrees:

- a. To support the issuance of a summary decision as described in Footnote 1;
- b. After Finality, not to interpose objections which are based upon the facts alleged in the HDO to the grant of Norcom's pending applications which have not been designated for hearing;
- c. Within ten (10) days after Finality, to inform the processing staff that this proceeding has concluded and no longer should be considered an impediment to the processing of Norcom's pending applications.

Waivers and Amendments

21. The failure of any Party to seek redress for a violation of, or to insist upon strict performance of, any provision of this Settlement Agreement shall not be deemed a waiver of that provision or estop that Party from fully asserting any or all of its rights under this Settlement Agreement. No amendment or waiver of any provision of this Settlement Agreement shall be effective unless the same shall be in writing and signed by all of the Parties affected thereby, and such written and signed amendment or waiver shall be effective only in the specific instance and for the specific purpose set forth in the text of the amendment or waiver.

Equal Access to Justice Act

22. Each of the Parties agrees to assume that Party's own costs, including attorneys' fees, incurred in connections with the Proceeding. Each of the Private Parties expressly waives any and all rights that they may have to seek relief under the Equal Access to Justice Act. See 5 U.S.C. § 504 and 28 U.S.C. § 2412.

Entire Agreement

23. This Agreement sets forth the entire agreement between or among the Parties with respect to the subject matter hereof and supersedes any prior negotiations, agreements, understanding or arrangements between or among the Parties with respect to the subject matter hereof.

Construction

24. This Settlement Agreement is a product of arms-length negotiation. In the event that an ambiguity exists in any provision of this Settlement Agreement, such ambiguity shall not construed by reference to any doctrine calling for construction of such ambiguity to be construed against the party that drafted this Settlement Agreement.

Applicable Law

25. This Agreement shall be governed by and construed in accordance with the laws of the District of Columbia, the Communications Act of 1934, as amended, and any applicable federal law as to any and all matters, including, but not limited to, validity, construction, effect, performance and remedies.

Section and Other Headings

26. The section and other headings contained in this Settlement Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Settlement Agreement.

Counterparts

27. This Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall

constitute one and the same instrument. Counterparts executed and received by telecopier transmission shall be deemed valid and binding upon the Parties.

IN WITNESS WHEREOF, the Parties have duly executed this Settlement Agreement as of the day and year first above written.

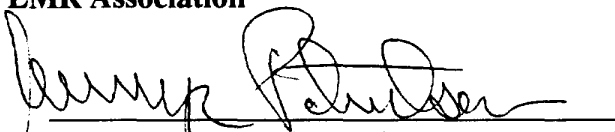
Wireless Telecommunications Bureau

By: 
Kathleen O'Brien-Ham
Deputy Bureau Chief

Norcom Communications Corporation

By: _____
Douglas Nopper, as President

**Association for East End Land Mobile Coverage
LMR 900 Association of Suffolk
NY LMR Association**

By: 
George Petrutsas, Counsel

Robert Nopper

Robert Nopper, Individually

Douglas Nopper

Douglas Nopper, Individually

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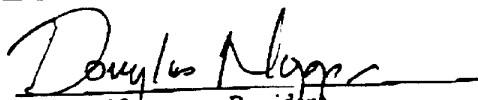
Wireless Telecommunications Bureau

By: _____

Kathleen O'Brien-Ham
Deputy Bureau Chief

Norcom Communications Corporation

By: _____

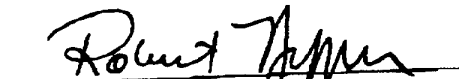

Douglas Nopper, as President

**Association for East End Land Mobile Coverage
LMR 900 Association of Suffolk
NY LMR Association**


By: _____

George Petrutsas, Counsel

Robert Nopper


Robert Nopper, Individually

Douglas Nopper


Douglas Nopper, Individually

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED
DEC - 9 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN THE MATTERS OF)

NORCOM COMMUNICATIONS CORPORATION)
ASS'N FOR EAST END LAND MOBILE COVERAGE)
LMR 900 ASSOCIATION OF SUFFOLK)
METRO NY LMR ASSOCIATION)
NY LMR ASSOCIATION)
WIRELESS COMM. ASSOCIATION OF SUFFOLK COUNTY)

WTB DOCKET NO. 98-181

TO: HON. ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIK

MOTION TO DELETE AND/OR CHANGE ISSUES

Norcom Communications Corp. ("Norcom"), by its attorneys and pursuant to section 1.229 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.229 (1997), hereby moves¹ the Presiding Judge to delete and/or change the following issues specified in the Commission's October 14, 1998, Hearing Designation Order ("HDO") in the above-captioned proceeding.² As set forth more fully below, grant of this Motion is in the public interest.

¹ This Motion is supported by the sworn statement of Robert Nopper. See **Exhibit A**.

² Section 1.229 of the FCC's rules specifies that motions to enlarge, change or delete issues should be submitted within fifteen (15) days after the full text or a summary of the order designating a case for hearing has been published in the Federal Register. Federal Register publication has not occurred. Nevertheless, Norcom submits this Motion in advance of the regulatory deadline in the interests of facilitating more expeditious resolution of this matter. Norcom has simultaneously submitted herewith a Motion asking the Presiding Judge to extend the period of time by which Norcom is required to respond to the FCC's requests for admission until after the Presiding Judge disposes of the instant Motion. The submission of this Motion does not waive any of Norcom's rights to request further changes or deletions to the issues in this proceeding consistent with the time period established in section 1.229 of the regulations.

**A. The Claim That Norcom Unlawfully Assumed Control
Of The Stations Licensed To The Above-Captioned Associations (“Associations”).**

The HDO accuses Norcom of violating FCC standards that do not apply to it or the Associations. In particular, the HDO states that the FCC assesses whether a transfer of control has occurred by employing the six-factor test first enunciated in *Intermountain Microwave*. 24 Rad. Reg. 983 (1963); HDO at ¶ 8. The *Intermountain Microwave* test, however, only applies to commercial mobile radio service (“CMRS”) providers and other common carriers. See Public Notice No. DA 96-1245 (1996); see also CMRS Fourth Report and Order, 9 FCC Rcd 7123, ¶ 20 (1994) (CMRS unauthorized transfer of control issues will be analyzed using six-factor *Intermountain Microwave* test). The test does not apply to non-CMRS licensees such as the Associations. *Id.* Thus, because of “unusual circumstances warranting deletion,” *American Broadcasting Companies, Inc.*, 20 FCC 2d 403, ¶ 13 (1969), namely the HDO’s specification of a legal wrong that does not apply to Norcom, the Presiding Judge should delete the issue.

The standard for determining whether a non-CMRS licensee has unlawfully transferred control to another entity is set forth at *Motorola, Inc.* (“*Motorola*”), as described in Public Notice No. 1932, released March 3, 1998 (“[T]he Bureau takes this opportunity to restate the guidelines....”). The tests are not comparable. The *Intermountain Microwave* standard involves the licensee’s relationship with others and evaluates such factors as unfettered access to facilities, employment decisions, and the payment of operating expenses, etc. The *Motorola, Inc.* standard, by contrast, focuses on such issues as how the licensee obtained its equipment and the licensee’s ultimate ability to terminate the management contract. The following table highlights the *significant* differences between the two standards:

Intermountain Microwave Standard for CMRS Stations	Motorola, Inc. Standard for Non-CMRS Stations
(a) Does the licensee have unfettered use of all facilities and equipment?	(a) Licensee's financing for purchase of equipment obtained independent of Manager.
(b) Who controls daily operations?	(b) Equipment not sold to Licensee for reduced price in return for permitting the Manager to serve as Manager.
(c) Who determines and carries out policy decisions, including preparing and filing applications with the Commission?	(c) There is nothing to distinguish the Licensee's equipment purchase from the Manager from other entities' purchase of equipment from the Manager.
(d) Who is in charge of employment, supervision and dismissal of personnel?	(d) Licensee retains authority under the management contract to supervise and instruct the Manager.
(e) Who is in charge of the payment of financial obligations, including expenses arising out of operating?	(e) Management contract permits Licensee to terminate the contract if the Manager fails to perform as instructed.
(f) Who receives the moneys and profits from the operation of the facilities?	

Accordingly, the HDO proceeding cannot logically or lawfully proceed with respect to this issue, especially if the sanction for non-compliance with the incorrectly identified standard is as severe as license revocation and the monetary forfeitures specified in the HDO.

Based on the foregoing, Norcom requests that the Presiding Judge delete the issue of unlawful transfer of control. The Presiding Judge should not allow the FCC to change the issue to incorporate the correct legal standard. The FCC has not performed an underlying investigation³ to uncover any of the facts necessary to apply that test. The Commission cannot amend its allegations to fit Norcom at this late date – it must first perform an investigation that results a substantial and material question of fact. Thus, the issue should be deleted in its entirety.

B. The Claim That Norcom Likely Abused The FCC's Licensing Process

The HDO alleges that Norcom “set up and controlled the Associations for the purpose of acquiring such licenses.” HDO at ¶ 13. The HDO further labels the Associations as

³ The FCC's investigation that resulted in the HDO took two years and cost Norcom time and legal fees.

“surrogates,” implying that Norcom and the Associations concealed their relationship. *Id.* The Presiding Judge should delete this issue. The FCC has stated that issues should be deleted when their initial specification was the result of the agency’s overlooking “material facts in specifying these issues,” or “other unusual circumstances warranting deletion.” *American Broadcasting Companies, Inc.*, 20 FCC 2d 403, ¶ 13 (1969). In this case, the FCC has overlooked key facts that prove that Norcom did not abuse the FCC’s processes – the existence of a 1992 negotiated agreement (“Agreement”) between the each of the Associations and the FCC which demonstrates that the FCC was fully aware of Norcom’s relationship with the Associations.

The Agreement and accompanying materials, attached as Exhibit B, demonstrate that:

- The Associations informed the FCC by correspondence dated May 23, 1991 (in response to the FCC’s April 10, 1991, return notice), that “the control point and mailing address is that of Norcom Communications Corporation. It is anticipated that Norcom will provide facilities for and will operate the control point of this association as a contractor. Norcom also helped organize this association.” *It is important to note that the relationship with Norcom was initially disclosed without any prompting by the FCC.*
- After receiving another application return notice, dated July 15, 1991, seeking additional information concerning their relationship with Norcom, the Associations responded with a letter dated August 26, 1991, describing the management and base station facilities that Norcom would provide the Associations.
- By correspondence dated September 17, 1992, the Associations proposed a detailed settlement agreement with the FCC.
- On October 28, 1992, the Chief of the Land Mobile Branch of the licensing division of the then Private Radio Bureau informed counsel for the Associations by letter that the applications of the Associations would be granted based on “an agreement which was negotiated with the Compliance Branch.”
- The initial licenses granted to each Association state that they were “granted pursuant to agreement of October 28, 1992.”
- Each Association license was subsequently renewed by the Commission.

Counsel for Norcom and the Associations brought the existence of the prolonged 1991-92 negotiations and resulting Agreement to the Commission's attention in a conference dated September 28, 1998. Staff of the Wireless Telecommunications Bureau attending that meeting appeared surprised and unaware of the existence of the Agreement. One staff member even requested additional information, such as the names of the FCC employees involved. The HDO was immediately thereafter adopted by the full Commission – but not released to the public – on September 30, 1998. Thus, Norcom is confident that the HDO was adopted without the FCC's knowledge of material facts – the existence of a negotiated 1992 agreement between each of the Associations and the FCC which included ample evidence of the role that Norcom intended to take in managing the stations licensed to the Associations. It would indeed be remarkable, and likely a breach of the Agreement, for the Commission to charge Norcom with acts that the Commission itself sanctioned.

A finding of abuse of process requires “a specific finding, supported by the record, of abusive intent.” *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020, ¶ 324 (1995). The FCC's action overlooking the existence of the Agreement that resulted in the grant of the licenses to the Associations – key facts which negate the specific intent required by the FCC's precedent – should result in the deletion of the issue of abuse of process. Norcom's relationship with the Associations was not concealed; the FCC knew of the relationship from the start. Thus, because the FCC negotiated the Agreement with the Associations with knowledge of this role, granted the licenses, and renewed the licenses at their short-term renewal mark, Norcom's conduct cannot constitute a “serious threat” to the Commission licensing processes. HDO at ¶ 12.


Like Norcom's request to delete the unlawful transfer of control issue, the FCC cannot change the issue of abuse of process and sustain the allegations in the HDO in light of the facts established herein. Because the Commission's precedent is clear that abuse of process is implicated by concealed arrangements, the issue should be deleted in its entirety.

* * *

Based on the foregoing, Norcom respectfully requests that the Presiding Judge delete the issues of unlawful transfer of control and abuse of process.

Respectfully submitted,

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Dated: December 9, 1998

CERTIFICATE OF SERVICE

I, Donna Fleming, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 9th day of December, 1998, caused to be sent by facsimile and overnight delivery, a copy of the foregoing Motion to the following:

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